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PP v. ASRI CHE DIN

HIGH COURT MALAYA, SHAH ALAM
TUN ABD MAJID HAMZAH JC
[CRIMINAL APPEAL NO: MT-BA-42H-161-09-2017]
18 APRIL 2018

B

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence – Appeal by prosecution – Accused pleaded guilty to offence under s. 6(1) of Corrosive and Explosive Substances and Offensive Weapons Act 1958 – Accused released under bond of good behaviour – Definition of serious offence and non-serious offence –*
C *Whether accused committed serious offence – Whether Sessions Court erred in invoking s. 294(1) of Criminal Procedure Code ('CPC') – Whether s. 294(6) excluded serious offences from application of s. 294(1) of CPC – Whether words 'serious offence' must be read in light of s. 172D(4) of CPC – Whether order of binding over wrong and illegal – Whether sentence imposed ought to be substituted with*
D *imprisonment – Penal Code, ss. 52A, 52B & 75A*

The respondent was charged in the Sessions Court with possession of offensive weapons namely, a sword and a knife, in a public place without a lawful purpose under s. 6(1) of the Corrosive and Explosives Substances and Offensive Weapons Act 1958 ('CESOWA'). The respondent pleaded guilty.
E The Sessions Court Judge released the respondent under a bond of good behaviour under s. 294(1) of the Criminal Procedure Code ('CPC') with one surety in the sum of RM3,500 for a period of five years. Dissatisfied with the sentence imposed, the Public Prosecutor ('the appellant') filed an appeal. The issue that arose was whether an offence under s. 6(1) of the CESOWA
F was a serious offence and if it was, then the court below had erred in invoking s. 294(1) of the CPC as this offence was committed after 1 March 2017.

Held (allowing appeal):

(1) If the court can impose a term of imprisonment of ten years or more,
G the offence is termed as a serious offence. The Government considered the offence under s. 6(1) of the CESOWA as a serious offence. If this court held an offence under s. 6(1) as non-serious then an offence under s. 41(1) of the Road Transport Act 1987, a comparison, which provides a sentence of imprisonment for a term of not less than two years and not
H more than ten years upon conviction would also be classified as non-serious. Surely that does not reflect the intention of the Legislature in enacting s. 41 as an offence that carries the highest penalty under the said Act. Therefore, an offence under s. 6(1) of CESOWA should not be classified as a non-serious offence. (paras 22-25)

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(2) Sections 52A and 52B of the Penal Code were enacted to give effect to s. 75A which was introduced in the Penal Code together with the two provisions as well as the new offences related to organised crimes. The provisions overlapped with one another as the cut-off term of imprisonment *ie*, ten years could work both ways and offences like s. 6(1) of CESOWA and s. 41(1) of Road Transport Act may be in the category of non-serious offence, which was not correct. Therefore, the definitions of both non-serious and serious offence under the Penal Code are only meant for offence under the said Code and could not be extended to other penal legislation. (paras 26 & 27)

(3) The CPC, on the other hand, being a general piece of legislation for criminal procedure, is applicable to all penal legislation. The purpose of s. 294(1) of the CPC is to empower the court to go for an alternative sentence when the court thinks it is expedient to release an accused person under a bond having regard to the factors or prerequisites mentioned in the said provision. However, with effect from 1 March 2017, s. 294(6) excluded serious offences from the application of s. 294(1) of the CPC. (para 28)

(4) Subsection 172D(4) of the CPC does not refer to any specific punishment fixed by law. Instead, it referred to the power of the court to sentence an accused person where the offence committed carries a maximum term of not less than ten years' imprisonment and that would include an offence under s. 6(1) of the CESOWA. Therefore, the words 'serious offence' referred to in s. 294(6) must be read in light of s. 172D(4) of the CPC. Thus, the order of binding over under s. 294(1) of the CPC was wrong and illegal and ought to be set aside. The sentence imposed was therefore substituted with an imprisonment of five years. (paras 29 & 30)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Application [2004] 1 CLJ 592 CA ***(refd)***
PP v. Jitweer Singh Ojagar Singh [2014] 1 CLJ 433 FC ***(refd)***

Legislation referred to:

Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)
Criminal Procedure Code, ss. 172D(1)(c)(i), (3)(a), (4), 172G, 173A, 293, 294(1), (6)
Penal Code, ss. 52A, 52B, 75A, 130U
Road Transport Act 1987, s. 41(1)

For the respondent - Sharul Shabaath Ali; M/s Farhan Maaruf & Co
For the prosecution - Aidatul Azura & Noor Husnita; DPP

Reported by Suhainah Wahiduddin

A

JUDGMENT

Tun Abd Majid Hamzah JC:

Introduction

B **[1]** The respondent was charged in the Sessions Court Kajang with possession of offensive weapons namely, a sword and a knife in a public place without a lawful purpose under sub-s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ("CESOWA").

C **[2]** He was produced in the Sessions Court on 4 August 2017 and the case was postponed to 24 August 2017 and subsequently to 12 September 2017 for delivery of documents. On 12 September 2017, the respondent pleaded guilty and after being addressed by the learned Deputy Public Prosecutor ("DPP") and the learned defence counsel, the learned Sessions Court Judge released the respondent under a bond of good behaviour under sub-s. 294(1) of the Criminal Procedure Code ("CPC") with one surety in the sum of D RM3,500 for a period of five years.

Facts Of The Case

[3] On 30 July 2017 at about 4.30am the policemen in plainclothes approached the respondent who was in his motorcar parked along Jalan E Warisan 3, Taman Warisan Impian, Batu 18 Hulu Langat, Selangor. Having introduced themselves, they conducted a search and found a knife on his person and a sword in the boot of the motorcar. The respondent tried to avoid arrest and he was pursued by the policemen and was apprehended after a scuffle.

F

The Appeal

[4] The Public Prosecutor being dissatisfied with the sentence imposed filed an appeal. The only issue in this appeal was whether an offence under sub-s. 6(1) of the CESOWA is a serious offence and if it is, then the court below has erred in invoking sub-s. 294(1) of the CPC by virtue of G sub-s. 294(6) of the CPC as this offence was committed after 1 March 2017.

[5] Perhaps I should mention here that this issue was not raised in the petition of appeal filed by the learned DPP. In the court below, learned counsel for the respondent did request for the invocation of sub-s. 294(1) of the CPC in his mitigation. However, the learned DPP in the court below in H response did not inform the court of the existence of sub-s. 294(6) of the CPC. Thus, the learned Sessions Court Judge proceeded to hand down the sentence based on the standard principles of sentencing.

[6] When the appeal came before me, I raised this issue and invited both I parties to address the court. As this is a point of law, relying on the Federal Court case of *PP v. Jitweer Singh Ojagar Singh* [2014] 1 CLJ 433; [2014] 6 MLJ 222 I would be able to consider it on appeal notwithstanding it was not an issue in the petition of appeal.

[7] The learned DPP submitted that sub-s. 294(6) of the CPC does not permit the court below to invoke sub-s. 294(1) as the maximum sentence provided for an offence under sub-s. 6(1) of the CESOWA is an imprisonment of ten years. Subsection 172D(4) of the CPC provides that a serious offence is where the maximum term of imprisonment that can be imposed is not less than ten years. And s. 52B of the Penal Code defines serious offence as an offence punishable with imprisonment for a term of ten years or more. Therefore, sub-s. 6(1) of the CESOWA is a serious offence and is being excluded from sub-s. 294(1) of the CPC after the amendment *vide* Act A1521 which came into force on 1 March 2017.

[8] The learned counsel for the respondent in response, submitted that an offence under sub-s. 6(1) of the CESOWA is not a serious offence as intended by sub-s. 294(6) of the CPC. According to him, upon conviction under sub-s. 6(1), an accused person is liable to imprisonment for a term of not less than five years and not more than ten years, and to whipping. The maximum sentence is imprisonment of not more than ten years. A similar phrase can be found in s. 52A of the Penal Code which defines a non-serious offence as an offence punishable with imprisonment for a term of not more than ten years. Therefore, he submitted that the definition of non-serious offence in the Penal Code ought to be applicable.

[9] The Penal Code defines non-serious offence and serious offence as follows:

> "Non-serious offence"
>
> 52A. The words "non-serious offence" denote an offence punishable with imprisonment for a term of not more than ten years.
>
> "Serious offence"
>
> 52B. The words "serious offence" denote an offence punishable with imprisonment for a term of ten years or more.

[10] The definition of non-serious offence was introduced *vide* Act A1471 which came into force on 31 December 2014. Whilst the definition of serious offence was introduced earlier *vide* Act A1430 where it was placed under s. 130U since 31 July 2012.

[11] *Vide* Act A1471 the definition of serious offence was taken out from s. 130U and replaced under Chapter II General Explanations, where the definition of non-serious offence was introduced. The Minister in the Prime Minister Department YB Puan Hajjah Nancy binti Shukri, during the second reading as reported in the Hansard dated 21 October 2013 addressed the Dewan Rakyat as follows:

> 11.35 pg.
>
> Menteri di Jabatan Perdana Menteri [Puan Hajah Nancy binti Shukri]: Terima kasih. Tuan Yang di-Pertua, saya mohon mencadangkan suatu akta untuk meminda Rang Undang-undang Kanun Keseksaan dibacakan

A kali yang kedua sekarang. Tuan Yang diPertua, kegiatan kumpulan jenayah terancang yang semakin berleluasa semenjak kebelakangan ini telah menimbulkan kegusaran masyarakat. Ia tidak dapat dinafikan bahawa terdapat peningkatan kadar jenayah di seluruh negara terutama sekali jenayah yang melibatkan senjata api. Kejadian jenayah ini dilakukan oleh kumpulan kongsi gelap yang menjadi semakin berani hingga menconteng dinding Balai Polis. Selain itu, terdapat juga penjenayah yang menjadi pembunuh upahan. Masyarakat kini tidak lagi merasa selamat untuk berada di tempat awam susulan daripada beberapa serangan ke atas anggota kumpulan jenayah terancang yang dilakukan oleh anggota kumpulan bersaing. Persaingan dan pembunuhan yang berlaku di tempat awam mengejutkan masyarakat. Kerajaan sememangnya mengambil berat dan memandang serius perkara ini dan akan mengambil tindakan tegas terhadap anggota jenayah terancang ini melalui kerangka perundangan yang komprehensif yang meliputi bukan sahaja pindaan kepada Kanun Keseksaan tetapi juga pindaan kepada Kanun Tatacara Jenayah, Akta Keterangan, Akta Kesalahan Keselamatan (Langkah-langkah Khas) 2012, Akta Bahanbahan Kakisan dan Letupan dan Senjata Berbahaya 1958, Akta Rumah Perjudian Terbuka 1953, Akta Loteri 1952 dan Akta Pertaruhan Pool 1967.

Clearly, the purpose of the amendment was to combat organised crime by introducing new offences and increasing the penalties for the existing offences.

[12] The Penal Code has undergone several amendments since the introduction of a new chapter namely, Chapter VIA pertaining to offences relating to terrorism *vide* Act A1210 in 2007. Thereafter, in connection with Chapter VIA, various new offences were introduced and sentences provided for had been increased:

(i) Act A1430 (with effect from 31 July 2012) – the introduction of Chapter VIB on organised crime and the definition of 'serious offence' was introduced;

(ii) Act A1471 (with effect from 31 December 2014) – the introduction of new offences related to organised crime and the increase of the sentences. The definition of 'non-serious offence' was introduced;

(iii) Act A1483 (with effect from 15 May 2015) – the introduction of additional offences relating to terrorism and the exclusion of the application of Offenders Compulsory Attendance Act 1954 and ss. 173A, 293 and 294 of the CPC to offences under Chapter VIA.

[13] Together with the introduction of ss. 52A and 52B, a new provision s. 75A was inserted which reads as follows:

> 75A. Punishment of mandatory imprisonment for persons convicted of multiple serious offences
>
> Whoever, having been convicted at least two times of a serious offence and was punished with at least two years of imprisonment for each of those convictions, shall be punished with mandatory imprisonment for the

> third and subsequent offences and the term of imprisonment shall not be less than double the term of the longer term of imprisonment imposed for the previous convictions.

Thus, the intention to create 'non-serious offence' and 'serious offence' was to cater for increased penalty for offences relating to terrorism and organised crime originally and subsequently for all offences under Penal Code.

[14] Subsection 6(1) of the CESOWA was amended *vide* Act A1463 where the imprisonment of two years was substituted with imprisonment for a term of not less than five years and not more than ten years. This amendment came into force on 2 July 2014.

[15] The CPC *vide* Act A1378 was amended to insert a new chapter namely, Chapter XVIIIA which came into force on 1 June 2012 which introduced *inter alia*, ss. 172D and 172G. This new chapter is an attempt to import the civil trials' scheme into criminal trials with the introduction of pre-trial conference, case management, witness statement, narrowing down the issues to be tried, plea bargain, etc. In short, to speedily dispose of the criminal trials.

[16] Section 172D deals with disposal of cases and specifically governs sentencing following a conviction being recorded. Subsection 172D(1)(c)(i) provides that the court may release the accused person under s. 293 or 294 or if imprisonment is imposed, the court shall not sentence an accused person more than half of the maximum punishment of imprisonment provided for the offence which the accused is convicted of as a result of a plea bargaining or a guilty plea in the circumstances provided under s. 172G of the CPC.

[17] However, sub-s. 172D(3)(a) provides *inter alia*, that the sentence of half of the maximum term of imprisonment would not be applicable in cases involving serious offence if the accused person has a previous conviction for a related or same offence. A serious offence for this purpose is where the maximum term of imprisonment that can be imposed is not less than ten years. This is provided under sub-s. 172D(4) of the CPC.

[18] Turning back to s. 294 of the CPC, it deals with an alternative sentence and it was not being excluded for serious offence until the amendment Act A1521 came into being.

[19] Now, where does sub-s. 6(1) of the CESOWA fall – whether it is a serious or a non-serious offence? And which definition of serious offence should be applicable to sub-s. 294(6) of the CPC?

[20] The Penal Code is a specific Act which provides for criminal acts or omissions. CESOWA is also another specific Act. The CPC is a general law which provides for criminal procedure for all offences unless stated otherwise in other penal statutes. For ease of reference, the relevant provisions are reproduced as follows:

(i) Section 52A of the Penal Code – The words "non-serious offence" denote an offence **punishable with imprisonment for a term of not more than ten years**.

(ii) Subsection 6(1) of the CESOWA – on conviction be **liable to imprisonment for a term of** not less than five years and **not more than ten years**, and to whipping.

(iii) Section 52B of the Penal Code – The words "serious offence" denote an offence **punishable with imprisonment for a term of ten years or more**.

(iv) Subsection 172D(4) of the CPC – for the purpose of para. (3)(a), "serious offence" means an offence where the **maximum term of imprisonment that can be imposed is not less than ten years**.

[21] The court may upon conviction under sub-s. 6(1) of the CESOWA impose a ten-year imprisonment and not more. So it appears to be a non-serious offence if the definition provided by s. 52A is applicable. Hence, sub-s. 294(1) of the CPC can be invoked and would not be caught by the amendment. However, this will not be consistent with the intention of increasing the punishment for sub-s. 6(1) of the CESOWA. It is pertinent in this respect to consider the speech delivered by the Deputy Minister of Home Affairs when he moved the amendment to CESOWA. The Hansard dated 9 April 2014 reveals the following:

> 5.23 ptg.
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> Timbalan Menteri Dalam Negeri [Datuk Dr. Haji Wan Junaidi Tuanku Jaafar]: Alhamdulillah. Bismillahi Rahmani Rahim, assalamualaikum warahmatullahi wabarakatuh. Tuan Yang di-Pertua, saya mohon mencadangkan iaitu bahawa Rang Undang-undang Bahan-bahan Kakisan dan Letupan dan Senjata Berbahaya (Pindaan) 2013 dibaca kali yang kedua sekarang.
>
> Tuan Yang di-Pertua, pindaan terhadap Akta Bahan-bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 turut dibuat untuk memastikan hukuman yang dikenakan setimpal dengan kesalahan yang dilakukan. Pindaan ini juga merupakan salah satu usaha kerajaan dalam membanteras aktiviti-aktiviti jenayah berat dan terancang yang menggunakan senjata berbahaya dan bahan letupan.
>
> Secara amnya, akta ini memperuntukkan penalti berkaitan pemilikan bahan-bahan kakisan dan bahan-bahan letupan secara salah serta membawa senjata berbahaya. Memandangkan kadar jenayah terancang dan jenayah berat dilakukan oleh kumpulan-kumpulan kongsi gelap yang sering melibatkan penggunaan senjata berbahaya termasuk senjata api semakin berleluasa. Peningkatan kejadian pembunuhan menggunakan senjata api, pergaduhan ahli-ahli kumpulan kongsi gelap sesama sendiri untuk merebut kawasan dengan menggunakan parang dan buku lima.

Menggunakan senjata berbahaya untuk mengutip wang perlindungan bagi menakutkan mangsa dan menggunakan senjata berbahaya bagi melindungi kawasan-kawasan perjudian dan pelacuran maka pindaan terhadap undang-undang ini adalah perlu dalam membanteras kegiatan berkenaan secara menyeluruh.

Bagi menggambarkan keseriusan kerajaan dalam menyampaikan mesej kepada masyarakat bahawa kesalahan ini adalah berupa satu kesalahan yang berat, maka pindaan terhadap penalti hukuman dicadangkan dinaikkan seperti berikut:

(i) menaikkan penalti bagi kesalahan membawa senjata berbahaya di tempat awam daripada tempoh pemenjaraan tidak melebihi dua tahun kepada tidak kurang daripada lima tahun dan tidak lebih dari 10 tahun;

(ii) meminda peruntukan penalti bagi kesalahan membawa, memiliki, membuat, menjual, menyewa, meminjam atau memberi mana-mana senjata terjadual. Kesalahan pada masa ini membawa hukuman pemenjaraan yang tidak melebihi dua tahun atau denda tidak melebih RM2,000 atau kedua-duanya sekali. Penalti dalam hal kesalahan kedua dan berikutnya akan dihukum dengan hukuman penjaraan tidak kurang daripada satu tahun dan tidak lebih daripada tiga tahun; dan

(iii) peruntukan ini dicadangkan untuk dipinda dengan mengenakan hukuman penjara yang tidak kurang daripada lima tahun dan tidak lebih daripada 10 tahun.

Dengan pindaan yang dicadangkan ini, maka jelas menggambarkan keprihatinan dan keseriusan kerajaan dalam membanteras jenayah terancang dan jenayah berat dari terus berleluasa di negara ini bagi memastikan rakyat Malaysia terus terlindung dan hidup dalam keadaan yang aman dan sejahtera. Tuan Yang di-Pertua, saya mohon mencadangkan.

[22] Thus, it is clear that the intention was to combat serious and organised crime in tandem with the amendment to the Penal Code. The Government considered the offence under sub-s. 6(1) of the CESOWA as a serious offence. A plain reading of the four provisions in question shows that the court is empowered to impose a ten-year term of imprisonment in all four situations except that for non-serious offence under the Penal Code and sub-s. 6(1) of CESOWA the court cannot impose a term of imprisonment exceeding ten years.

[23] The impression I have is, if the court can impose a term of imprisonment of ten years or more, the offence is termed as serious offence. It is a non-serious offence if the court can only impose a sentence of ten years and below notwithstanding the minimum or maximum term of imprisonment that is fixed by law for a particular offence.

[24] If I hold an offence under sub-s. 6(1) of CESOWA as non-serious, then an offence under sub-s. 41(1) of the Road Transport Act 1987, as comparison, which provides a sentence of imprisonment for a term of not less than two years and not more than ten years upon conviction would also be classified as non-serious. Surely that does not reflect the intention of the Legislature in enacting s. 41 as an offence that carries the highest penalty under the said Act.

[25] Therefore, I do not think an offence under sub-s. 6(1) of CESOWA is or should be classified as a non-serious offence.

[26] It is my considered view that ss. 52A and 52B were enacted to give effect to s. 75A which was introduced in the Penal Code together with the two provisions as well as the new offences related to organised crimes. In *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97, the Federal Court speaking through Augustine Paul FCJ at pp. 210-211 (CLJ); pp. 107-108 (MLJ) held as follows:

> In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th edn) says at p, 566:
>
> (1) Legislation is always to be understood first in accordance with its plain meaning.
>
> (2) Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.
>
> (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.
>
> (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
>
> (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.
>
> The choice prescribed in s. 17A of '... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If, therefore, the language of a provision is plain and unambiguous s. 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more different meanings can s. 17A be resorted to in order

to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s. 17A.

[27] By plain reading, I find that the four provisions overlapped with one another as the cut-off term of imprisonment ie, ten years could work both ways and offences like sub-s. 6(1) of CESOWA and sub-s. 41(1) may be in the category of non-serious offence which I do not think that is correct. Therefore, it is my view that the definitions of both non- serious and serious offence under the Penal Code are only meant for offences under the said Code and cannot be extended to other penal legislation.

[28] As earlier said, the CPC on the other hand being a general piece of legislation for criminal procedure is applicable to all penal legislation. The purpose of sub-s. 294(1) of the CPC is to empower the court to go for an alternative sentence when the court thinks it is expedient to release an accused person under a bond having regard to the factors or prerequisites mentioned in the said provision. However, with effect from 1 March 2017 sub-s. 294(6) will exclude serious offences from the application of sub-s. 294(1) of the CPC.

[29] Subsection 172D(4) does not refer to any specific punishment fixed by law, instead it refers to the power of the court to sentence an accused person where the offence committed carries a maximum term of not less than ten years' imprisonment and that would include an offence under sub-s. 6(1) of the CESOWA as well as sub-s. 41(1) of the Road Transport Act which I have alluded to as a comparison. Therefore, to my mind, the words 'serious offence' referred to in sub-s. 294(6) must be read in the light of sub-s. 172D(4) of the CPC.

[30] Based on the above discussion, I hold that the order of binding over under sub-s. 294(1) of the CPC was wrong and illegal and set it aside. I allowed the appeal by the Public Prosecutor and substituted the sentence imposed by the learned Sessions Court Judge with an imprisonment of five years from 4 April 2018. I also refused the application for a stay of execution as there were no special circumstances in this case. (see *Dato' Seri Anwar Ibrahim v. PP & Another Application* [2004] 1 CLJ 592). The respondent has now appealed against my decision.